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No. 84-81

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

RAYMOND T. MORGAN,

PETITIONER,

v.

THE PEOPLE OF THE STATE OF COLORADO,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF COLORADO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the warrantless seizure of spent bullets from petitioner's front yard was lawful.

2. Whether this Court has jurisdiction to review an issue that petitioner failed to present to the Colorado Supreme Court on certiorari.

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OPINION BELOW

In his Petition for Writ of Certiorari to the Colorado Court of Appeals, petitioner failed to ask the Colorado Supreme Court to review the issue of whether statements he made to a detective were properly admitted at trial. [Question B presented by

petitioner, Page 6 of Petition.] The Colorado Supreme Court's order denying certiorari pertains, therefore, only to petitioner's Question A.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

Petitioner erroneously relies on 28 U.S.C. 1254(1) to invoke the jurisdiction of this Court.

SUPPLEMENTAL STATEMENT OF THE CASE

Respondent submits the following to supplement and clarify petitioner's Statement of the Case.

Petitioner was found guilty by a jury of both conspiracy to commit murder in the first degree and first degree murder.

Three neighbors of the victim witnessed the murder and identified petitioner at trial as the person who

shot Richard Wisse. They each testified that they had not definitely identified petitioner prior to trial because they were scared. A fourth neighbor identified petitioner as one of the two men whom he saw get out of a car and walk toward the victim's house shortly before the shooting. After hearing several gunshots, he saw petitioner and the other man return to the car and drive away.

On June 15, 1978, approximately two hours before the murder, petitioner fired a gun two or three times into his front yard. Two of his neighbors saw him firing the gun, and on June 17, 1978, one of the neighbors gave this information to the investigating homicide detective. As a result, two expended bullets were recovered from "gouges" in petitioner's front yard.

SUMMARY OF ARGUMENT

The Fourth Amendment protects people, not places. Katz v. United States, 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967). Fourth Amendment analysis is now based on a legitimate or reasonable expectation of privacy test rather than on property concepts. Here, petitioner's actions were the antithesis of any expectation of privacy: he fired a gun two or three times into his front yard with his neighbors watching.

Pursuant to 28 U.S.C. § 1257, this Court lacks jurisdiction to review petitioner's Question B in his Petition for Writ of Certiorari. Petitioner failed to present the question to the Colorado Supreme Court on certiorari, and thus there is no final judgment by the highest state court.

ARGUMENT

A. THE WARRANTLESS SEIZURE OF SPENT BULLETS FROM PETITIONER'S FRONT YARD DID NOT VIOLATE PETITIONER'S REASONABLE EXPECTATION OF PRIVACY AND WAS, THEREFORE, CONSTITUTIONAL.

On June 15, 1978, the day of the murder of Richard Wisse, in daylight and in front of his neighbors, petitioner fired a gun two or three times into his front lawn. The front yard was not enclosed, but open to public view, and was used by other tenants of the home as well as by the public.

On June 17, 1978, one of the neighbors who saw petitioner firing the gun gave this information to an investigating homicide detective. The detective went to petitioner's residence and from the public sidewalk saw two "gouges" in the front lawn. Two expended bullets were recovered from the gouges.

Prior to trial, petitioner moved to suppress the bullets on the ground of an illegal search, and the trial court denied the motion. The trial court's ruling was principally based on petitioner's lack of expectation of privacy, rather than on abandonment as alleged by petitioner.

The trial court ruled that, under the facts of the instant case, petitioner exhibited no reasonable or legitimate expectation of privacy when he publicly shot the bullets into his front yard. Hence, the warrantless seizure of the bullets did not violate petitioner's Fourth Amendment rights. The Colorado Court of Appeals agreed with the trial court's ruling.

Petitioner now asks this Court to view the search in light of the character of front and backyards of residences

as constitutionally protected curtilage requiring a warrant prior to any search.

In Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), the parties' arguments were based on whether a telephone booth could be characterized as a constitutionally protected area. The Katz court declined to address the issue of whether a given "area" was constitutionally protected, because the scope of the interest protected by the Fourth Amendment depends not upon a property right in the invaded place, but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy.

Consistent with Katz, this Court uniformly has held that application of the Fourth Amendment depends on whether the person invoking its privilege has a justifiable, reasonable, or legitimate

expectation of privacy that has been violated by the government. Rawlings v. Kentucky, 448 U.S. 97, 104-106, 100 S.Ct. 2556, 2561-2562, 65 L.Ed.2d 633 (1980); Rakas v. Illinois, 439 U.S. 128, 143, 99 S.Ct. 421, 430, 58 L.Ed.2d 387 (1978); United States v. Chadwick, 433 U.S. 1, 7, 97 S.Ct. 2476, 2481, 53 L.Ed.2d 538 (1977). This principle was recently reiterated in Illinois v. Andreas, ___ U.S. ___, 103 S.Ct. 3319, 3323 (1983):

> The Fourth Amendment protects legitimate expectations of privacy rather than simply places. If the inspection by police does not intrude upon a legitimate expectation of privacy, there is no "search" subject to the Warrant Clause.

Thus, the proper question in this case is not which land surrounding a house is constitutionally protected, but whether petitioner exhibited a reasonable expectation of privacy which was

violated by an unjustified government intrusion.

The determination of whether a defendant has a legitimate expectation of privacy involves two distinct questions as set forth in Smith v. Maryland, 442 U.S. 735, 740, 99 S.Ct. 2577, 2580, 61 L.Ed.2d 220 (1979):

> The first is whether the individual, by his conduct, has "exhibited an actual (subjective) expectation of privacy,"...whether, in the words of the Katz majority, the individual has shown that "he seeks to preserve [something] as private."... The second question is whether the individual's subjective expectation of privacy is "one that society is prepared to recognize as 'reasonable,'"... whether, in the words of the Katz majority, the individual's expectation, viewed objectively, is "justifiable" under the circumstances.

Accord: United States v. Knotts, ___ U.S. ___, 103 S.Ct. 1081 (1983).

In applying this analysis to the instant case, we assert that petitioner

had no subjective nor objective expectation of privacy. Petitioner took no precautions to maintain his privacy nor even to conceal the fact that he was firing a gun in his front yard. The bullets were found in petitioner's front yard where any passerby could see the holes, and petitioner made no attempt to cover or smooth over the holes. What a person knowingly exposes to the public is not subject to Fourth Amendment protection. Katz v. United States, 389 U.S. at 351, 88 S.Ct. at 511.

As Mr. Justice Harlan stated in his Katz concurrence (389 U.S. at 361, 88 S.Ct. at 516):

> [A] man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited.

Respondent avers that petitioner patently demonstrated no subjective expectation of privacy when he fired the bullets into his front yard in the plain view of his neighbors.

Objectively, there was no reasonable expectation of privacy in the bullets in petitioner's front yard which is an area open to public view. Further, the detective was able to observe the gouges from the sidewalk which is open to public use, thus negating any reasonable expectation of privacy in regard to the observations made. Under these circumstances, no "search" occurred, because no expectation of privacy that society would consider reasonable was infringed. United States v. Jacobsen, ___ U.S. ___, 104 S.Ct. 1652, 1656 (1984).

Petitioner relies on Oliver v. United States, ___ U.S. ___, 104 S.Ct.

1735 (1984), to support his contention that a warrant is required before conducting any search of the curtilage. Although the Oliver Court recognized that Fourth Amendment protection has been extended to the curtilage, consistent with Katz, the Court stated (Reporter at 1743):

> The existence of a property right is but one element in determining whether expectations of privacy are legitimate.

The Court noted that since Katz, the touchstone of Fourth Amendment analysis has been the question whether a person has a constitutionally protected reasonable expectation of privacy -- not only subjectively, but a privacy expectation that society is also prepared to recognize as reasonable.

And as the Oliver Court quoted from Rakas v. Illinois, 439 U.S., at 144

n. 12, 99 S.Ct., at 431 n. 12 (Reporter at 1744):

> [E]ven a property interest in premises may not be sufficient to establish a legitimate expectation of privacy with respect to particular items located on the premises or activity conducted thereon.

Petitioner's reliance on Wattenburg v. United States, 388 F.2d 853 (9th Cir. 1968) and Fixel v. Wainwright, 492 F.2d 480 (5th Cir. 1974), is also misplaced. Both cases are readily distinguished, because the seizures were made from backyards that are not open to public view or use and thus carry an expectation of privacy. See United States v. Van Dyke, 643 F.2d 992 (4th Cir. 1981), where the court narrowly ruled that officers' observations were made from the curtilage, but stated that under this Court's direction, the substantive question to be considered would be whether a defendant had a legitimate

expectation of privacy in the area searched.

In sum, because petitioner's activities occurred on his front lawn, in public view, no legitimate privacy interest attached.

B. THIS COURT LACKS JURISDICTION TO REVIEW QUESTION B OF THE PETITION FOR CERTIORARI, BECAUSE PETITIONER FAILED TO EXHAUST HIS STATE REMEDIES.

After petitioner's convictions, he appealed to the Colorado Court of Appeals, which affirmed the judgments. Petitioner then unsuccessfully petitioned for further discretionary review in the Colorado Supreme Court, but did not present the issue of whether statements he made to the investigating detective were properly admitted at trial. Hence, petitioner failed to exhaust his state remedies, and his Question B is not properly before this

Court. Douglas v. People of State of California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963), rehearing denied 373 U.S. 905, 83 S.Ct. 1288.

Banks v. California, 395 U.S. 708, 89 S.Ct. 1901, 23 L.Ed.2d 653 (1969), rehearing denied 396 U.S. 869, 90 S.Ct. 36, is dispositive, because there petitioner Banks also did not ask the state supreme court to review the judgment entered by the state court of appeal. This Court held:

> Therefore, the decision of the Court of Appeal is not a "[f]inal judgment * * * rendered by the highest court of a State in which a decision could be had * * *." 28 U.S.C. § 1257, and we lack jurisdiction to review it.

We aver that petitioner cannot invoke the jurisdiction of this Court under 28 U.S.C. § 1257 as to Question B, because there is no final judgment rendered by the Colorado Supreme Court.

CONCLUSION

Respondent, the People of the State of Colorado, respectfully ask this Court to deny the petition for certiorari.

Respectfully submitted,

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September 6, 1984

Certificate of Service

Pursuant to Sup. Ct. R. 28.5(b), I hereby certify that 3 copies of the foregoing respondent's Brief in Opposition to Petition for Writ of Certiorari have been placed in the United States mail on September 6, 1984, properly addressed, to:

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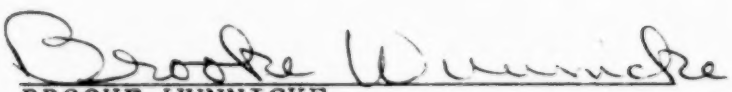

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